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**IN THE SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1996

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ARTHUR CALDERON, Warden; TEENA FARMON, Warden of the Central California Women's Facility; JAMES H. GOMEZ, Director, California Department of Corrections; DANIEL E. LUNGREN, Attorney General, *Petitioner*,

v.

TROY A. ASHMUS, of himself as an individual and on behalf of himself and all others similarly situated, *Respondent*.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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# PETITION FOR WRIT OF CERTIORARI

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(CAPITAL CASE)

## QUESTIONS PRESENTED

A California death row inmate brought a class action suit against state officials, challenging their view that California's mechanism for appointing and compensating state collateral counsel in capital cases satisfies the criteria established in Chapter 154 of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Without addressing the Eleventh Amendment, the district court allowed the suit, concluded that California's mechanism does not qualify under Chapter 154, and issued a statewide injunction barring California officials from contending otherwise in any proceeding involving any class member. Disagreeing with *Booth v. Maryland*, 112 F.3d 139 (CA4 1997), *cert. pending* No. 97-5623, the Ninth Circuit concluded that the inmate's suit was authorized under the *Ex Parte Young* doctrine because it "identif[ied] a continuing or impending violation of federal law" by state officials, and affirmed. The questions presented are:

1. Does the Eleventh Amendment bar coercive suits that seek to prevent state officials from advocating their views on disputed issues of law that will arise and be adjudicated in the regular course of habeas litigation?

2. Does an injunction barring one party from seeking favorable judicial rulings on disputed questions of law and procedure constitute an impermissible viewpoint-specific prior restraint on lawful advocacy?

3. Does California's mechanism for appointment and compensation of collateral capital counsel satisfy the criteria established by Congress in Chapter 154?

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**IN THE SUPREME COURT OF THE UNITED STATES**

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v.

TROY A. ASHMUS, of himself as an individual on behalf of himself and all others similarly situated, *Respondent*.

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

---

Arthur Calderon, Teena Farmon, James H. Gomez, and Daniel E. Lungren respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

## OPINION BELOW

The opinion of the court of appeals, App. 1a-24a, is reported at ___ F.3d ___, 1997 WL 469527 (CA9 1997). The opinion of the district court, App. 25a-80a, is reported at 935 F. Supp. 1048 (N.D. Cal. 1996)

## JURISDICTION

The court of appeals entered its judgment on August 18, 1997. App. 1a. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254(1).

## RELEVANT PROVISIONS OF LAW

1. U.S. Const., amend. XI
2. 28 U.S.C. § 2261
3. 28 U.S.C. § 2265
4. Cal. Gov't Code § 68511.5 (West Supp. 1997)
5. Cal. Gov't Code § 68070 (West Supp. 1997)
6. Cal. Rules of Court, rule 76.5 (West 1996)
7. Appen. to Cal. Rules of Court, Judicial Administration Standards (Div. I) § 20 (West 1996)
8. Cal. Pen. Code § 1241 (West 1982)
9. Cal. Sup. Ct. Policies Regarding Cases Arising from Judgments of Death, Court Rules Vol. 23, pt. 3 (West 1996 & Supp. 1997)
10. Cal. Sup. Ct. Payment Guidelines for Appointed Counsel Representing Indigent Criminal Appellants, Court Rules Vol. 23, pt. 3 (West 1996)
11. Cal. Sup. Ct. Guidelines for Fixed Fee Appointments, on Optional Basis, to Automatic Appeals and Related Habeas Corpus Proceedings, Court Rules Vol. 23, pt. 3 (West 1966 & Supp. 1997)



## STATEMENT OF THE CASE

Enacted as Title I, section 107, of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), new Chapter 154 of Title 28 institutes adjudicative reforms for federal habeas corpus review of capital judgments from states that establish qualifying mechanisms for appointing and compensating state collateral counsel. Seeking to block application of those reforms to the federal judiciary's review of California capital judgments, a death row inmate brought this class action against state officials for preemptive declaratory and injunctive relief. Filed the same day the AEDPA was signed into law, the inmate's complaint styled this suit a "civil rights" action "brought pursuant to 42 U.S.C. § 1983," and purported to invoke the jurisdiction of the district court under 28 U.S.C. sections 1343(a)(3) and (4) (civil rights) and 1331 (federal question); equitable relief was sought pursuant to 28 U.S.C. sections 1343(a)(3), 2201, and 2202.

Without addressing state officials' claim of Eleventh Amendment immunity from such a suit, the district court allowed it go forward, concluded that California's collateral review procedures do not include a qualifying mechanism under Chapter 154, and issued a statewide injunction barring state officials from advocating otherwise in any legal proceedings involving death row inmates. In a 2-1 decision, the Ninth Circuit affirmed, rejecting the Eleventh Amendment immunity claim with a finding that the inmates, by challenging the state's "announced intention" to urge application of Chapter 154 in the federal courts, had "identif[ied] a continuing or impending violation of federal law" by state officials. In so holding, the Ninth Circuit created an "inter-circuit conflict of decision in a matter of national concern." App. 24a (Beezer, C.J., diss.) (citing *Booth v. Maryland*, 112 F.3d 139 (CA4 1997)).

## A. Chapter 154

Chapter 154 implements wide-ranging reforms relating to federal habeas corpus review of state capital judgments "with special rules favorable to the state party, but applicable only if the State meets certain conditions, including provision for appointment of postconviction counsel in state proceedings." *Lindh v. Murphy,* 117 S.Ct. 2059, 2063 (1997). A qualifying mechanism can be either "unitary" or "nonunitary." The latter entails appointments of counsel to provide representation "in State post-conviction proceedings brought by indigent prisoners whose capital convictions and sentences *have been upheld* on direct appeal to the court of last resort in the State or have otherwise *become final* for State law purposes." 28 U.S.C. § 2261; App. 82a (emphasis added). The former, which is the model in use in California, provides appointments for representation in the state's "*unitary* review procedure," defined by Congress as "a State procedure that authorizes a person under sentence of death to raise, *in the course of direct review* of the judgment, such claims as could be raised on collateral attack." *Id.* § 2265; App. 84a (emphases added).

In order for a state's unitary review procedure to qualify under Chapter 154, it must "establish[] by rule of its court of last resort or by statute a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel . . ." incurred in connection with collateral claims, and such rule of court or statute must "provide standards of competency for the appointment of such counsel." Further, the state's mechanism must include an "offer of counsel" and "entry of an order" either (1) providing appointment "upon a finding that the prisoner is indigent and has accepted the offer," or (2) finding that the prisoner competently rejected the state's offer, or (3) denying appointment upon a finding that the prisoner is not indigent. Finally, no



counsel appointed to provide representation in connection with collateral claims shall have previously represented the prisoner at trial (in a unitary state) or either at trial or on direct appeal (in a nonunitary state), "unless the prisoner and counsel expressly request continued representation." 28 U.S.C. §§ 2261, 2265; App. 82a-85a.[1]

## B. The Components and Origins of California's Unitary Mechanism

Article 6, section 6, of the California Constitution empowers the California Judicial Council to "adopt rules for court administration, practice and procedure and perform other functions prescribed by statute." Cal. Const., art. 6, § 6 (West Supp. 1997). In addition, under California law, "*Every court* may make rules for its own government and the government of its officers not inconsistent with law or with the rules adopted and prescribed by the Judicial Council." Cal. Gov't. Code § 68070 (West Supp. 1997); App. 87a.

California Government Code section 68511.5 specifically directs the State Judicial Council to

> adopt rules of court regulating the selection of appointed counsel, other than the State Public

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1. The criteria by which unitary and nonunitary mechanisms will qualify are otherwise substantially identical, the only other differences being these: (1) whereas the offer of counsel in a unitary state occurs "following trial" (since the ensuing state appellate court review will be "unitary"), the offer of collateral counsel in a nonunitary state is extended after the prisoner's capital conviction and sentence is affirmed on direct appeal (because only then will any collateral review phase ordinarily begin), *compare* § 2261(b) *with* § 2265(b) & (c); and (2) whereas a qualifying mechanism in a unitary state must be established "by rule of its court of last resort or by statute," a nonunitary state's mechanism can be established by either of those devices or, alternatively, "by another agency authorized by State law," *compare* § 2261(b) with § 2265(a).

> Defender, to handle criminal appeals by indigent defendants. These rules shall establish procedures for the appointment of counsel in all appellate districts. In developing these rules, the Judicial Council shall consider the need to include screening of eligible appointees, the need to match the skills and experience of the attorney with the demands of the case and the process by which this might be done, and the need or desirability of evaluating an attorney's performance before assigning the attorney to another case. Further, in developing these rules, the Judicial Council shall consult with local bar associations and the Office the State Public Defender.

Cal. Gov't. Code § 68511.5 (West Supp. 1997); App. 86a.

Accordingly, Rule 76.5 of the California Rules of Court (effective January 1, 1985), directs that "[e]ach appellate court shall adopt procedures for appointment of counsel in criminal cases for indigent appellants who are not represented by the State Public Defender." Cal. Rules of Court, rule 76.5 (West 1996); App. 86a. Toward that end, the rule further directs that appointments be made from lists, the court's compilation of which shall be accomplished by "consider[ing] the guidelines in section 20 of the Standards of Judicial Administration Recommended by the Judicial Council . . . ", *id.*, a provision which itself cross-references Rule 76.5 and went into effect the same day. *See* Appen. to Cal. Rules of Court, Judicial Administration Standards (Div. I) § 20, Court Rules Vol. 23, pt. 2, at 680 (West 1996) (historical note). All such Standards of Judicial Administration have been adopted by the Judicial Council "[u]nder its authority granted by Article VI, section 6, of the Constitution . . . ." and "[t]hey are published in Division I of the Appendix to the California Rules of Court." Cal. Rules of Court,



Introductory Statement, Court Rules Vol 23, pt. 1, at 4 (West 1996). Subdivision (c) of Section 20 of the Standards states:

> **(c) [Supreme Court]** The Supreme Court should maintain a list of attorneys for appointment in death penalty cases, based on the following minimum qualifications: (1) active practice of law for four years in the California state courts or equivalent experience; (2) attendance at three approved appellate training programs, including one program concerning the death penalty; (3) completion of seven appellate cases, one of which involves a homicide; and (4) submission of two appellant's opening briefs written by the attorney, one of which involves a homicide, for a review by the court of administrator.

Appen. to Cal. Rules of Court, Judicial Administration Standards (Div. I) § 20, Court Rules Vol. 23, pt. 2, at 680 (West 1996); App. 91a.[2/]

Effective June 6, 1989, the California Supreme Court's published "Policies Regarding Cases Arising From Judgments of Death" explicitly state that "Appellate

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2. Consistent with the provisions of Chapter 154, all appointments in California capital cases are made by formal order. Since April 24, 1991, all orders have expressly noted that the appointment extends to representation in any related habeas proceedings. A copy of the appointment order is mailed to the assigned attorney, along with other information to assist counsel in the preparation of interim payment requests and related materials. Since February 18, 1986, no attorney who provided representation at a capital trial in California has been appointed to represent the same inmate in post-conviction proceedings. Dist. Ct. Clerk's Rec. No. (hereafter "CR") 25; Excerpt of Rec. on Appeal (hereafter "ER") 54-55.

counsel in capital cases shall have a duty to investigate factual and legal grounds for the filing of a petition for writ of habeas corpus," and the Policies direct that such petitions "be filed without substantial delay." Cal. Sup. Ct. Policies Regarding Cases Arising From Judgments of Death Policy 3.1-1, Court Rules Vol. 23, pt.3 (West Supp. 1997); App. 93a-98a; *see also In re Clark*, 5 Cal.4th 750, 782-787, 21 Cal.Rptr.2d 509, 530-533, 855 P.2d 729, 750-753 (1993).

Every counsel appointed by a California appellate court to "any appeal or proceeding" is statutorily guaranteed "a reasonable sum for compensation and necessary expenses." Cal. Pen. Code § 1241 (West 1982); App. 92a. This assurance is supplemented in capital cases by comprehensive compensation standards and exhaustive guidelines for payment under a choice of rate schedules, all of which explicitly address the funding of costs related to the investigation and presentation of habeas claims. Cal. Sup. Ct. Policies Regarding Cases Arising from Judgments of Death, *supra*, Policy 3.2; Cal. Sup. Ct. Payment Guidelines for Appointed Counsel Representing Indigent Criminal Appellants, Guidelines II. A.; II.*J*.3; III., Court Rules Vol. 23, pt. 3, at 147-155 (West 1996); Cal. Sup. Ct. Guidelines for Fixed Fee Appointments, on Optional Basis, to Automatic Appeals and Related Habeas Corpus Proceedings, Guidelines 1-4, 9, Court Rules Vol. 23, pt. 3, at 156-160 (West 1996); App. 93a-120a.

## C. Proceedings Below

Troy A. Ashmus, whose state capital judgment and sentence were affirmed in 1991, *People v. Ashmus*, 54 Cal.3d 932, 2 Cal.Rptr.2d 112, 820 P.2d 214 (1991), initiated these federal proceedings as a civil rights suit after state officials publicly "indicated their belief" that Chapter 154 would govern federal review of California



death judgments. CR 1 at 2; CR 6 at 4-5. Fearing "uncertainty about the application of Chapter 154" in California, CR 1 at 3, and anticipating that state officials would, unless restrained, argue its applicability before federal judges, Ashmus characterized state officials' expected conduct as a form of illegal "enforcement" actionable under *Ex Parte Young*, 209 U.S. 123 (1908). CR 1 at 12-13; CR 18 at 4-5; CR 30 at 4-8.[3]

The district court granted the requested relief. While recognizing that "Congress . . . has entrusted *to the federal judiciary* [rather than state officials] the responsibility and obligation for determining when Chapter 154 applies to a given state," the court concluded that California death row inmates "will be forced to forfeit their rights under Chapter 153 as a direct result of the *uncertainty* over Chapter 154's applicability created by defendants' *assertions*." App. 32a, 33a (emphases added). While also acknowledging that the propriety of the inmates' resort to the provisions of 42 U.S.C. § 1983 presented "a difficult issue of first impression," the resolution of which "is not entirely free from doubt," *id*. at 44a-48a, 78a, the court refused to dismiss the complaint, CR 48 at 17; ER 72, but "independent[ly]" and "addition[ally]" conferred them relief under 28 U.S.C. §§ 2201-2202, reasoning that the inmates "fall within the class of litigants whom Congress intended to confer rights upon via the Declaratory Judgment Act" and also "within the class of people whom Congress intended to confer rights upon under the habeas corpus provisions of Chapter 153 and 154." App. at 44a-48a, 78a. The court did not address whether the Eleventh

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3. Though filed as class action on behalf of every death row inmate in California, the complaint identified just one of the inmates by name—Mr. Ashmus, whose counsel filed a notice "relating" the suit, for purposes of judicial assignment, *see* No. Dist. Cal. Local R. 3-12, to his nascent habeas proceeding, *Ashmus v. Calderon*, No. C-93-0594-TEH (petition filed Apr. 17, 1997). CR 9.

Amendment barred the inmates' coercive suit against state officials; however, in response to state officials' observation that questions concerning the application of the new habeas reforms should properly be presented and resolved in the course of any habeas proceeding in which such questions arise, the court declared that it felt "required to resolve the question as it in fact was presented, not as defendants wish it had been presented." *Id.* at 60a.

Rejecting state officials' constitutional objections to having their adversarial activities enjoined, the district court acknowledged that state officials "certainly have a fundamental First Amendment right to express their views" on the applicability of Chapter 154, but suggested this right must yield because "the *manner* in which they have" expressed their views has placed death row inmates "in a very different position with respect to their habeas corpus rights than they would be if defendants had not done so." App. 35a (emphasis added). Notwithstanding its further acknowledgment that barring state officials on a statewide basis from advocating their views on the applicability of Chapter 154 "may constrain the ability of other co-equal district court judges to decide the issue differently," the court felt itself "obligated" to act as it did. *Id.* at 59a-60a.

Finally, the court determined that California's procedures fail to satisfy the criteria prescribed by Chapter 154 in the following five respects: First, the court concluded that the California's Supreme Court's refusal to expend public funds for "fishing expeditions" to uncover "*any*" basis for a collateral claim, though a "sensible" limitation, is "objectively deficient" because it restricts appointed counsel to pursuing only those collateral issues "that are knowable by reference to the four corners of the appellate record." App. 65a-67a. Second, because California does not confer the benefit of appointed



counsel "immediate[ly]"—as evidenced by the fact that there are many death row inmates in California who have requested an appointment but not yet received one and will likely wait "some time" before they do—the district court determined that California does not make its appointments "upon a finding" that inmates are indigent and have accepted the state's offer. *Id.* at 75a. Third, the court found that California has no qualifying competency standards for counsel because its standards appear in section 20 of the Standards of Judicial Administration and that provision is neither a "rule of court" nor a "statute." *Id.* at 69a-71a. Fourth, the court concluded that section 20's standards cannot qualify California under Chapter 154 because they are not "binding or mandatory." *Id.* at 71a-73a. Finally, the standards were deemed deficient because they make "no mention of original habeas proceedings and . . . require[] no minimum experience whatsoever in habeas proceedings." *Id.* at 73a-74a.

By a 2-1 decision the Ninth Circuit "reluctant[ly]" rejected the last of these grounds on which the district court based its ruling, App. 19a, but agreed with the remaining points and affirmed. *Id.* at 18a-20a, 22a. As a threshold matter, the majority declined to follow the Fourth Circuit's recent decision in *Booth v. Maryland*, 112 F.3d 139 (CA4 1997), whose teaching would have required dismissal of the inmates' suit under the Eleventh Amendment; instead, the court determined that the inmates' action "falls within the *Ex Parte Young* exception, and the Eleventh Amendment does not bar this suit" because the inmates had "identifi[ed] a continuing or impending violation of federal law," as follows:

> [The inmates] have demonstrated that California's announced intention to invoke Chapter 154 without having complied with that Chapter's opt-in requirements (as we discuss later in this opinion) threatens to violate their

> right to federal review of their habeas petitions, pursuant to Chapter 153 of Title 28, and their right to assistance of counsel, pursuant to 21 U.S.C. § 848(q). Chapter 153 provides for a thorough federal review of a petitioner's first habeas petition. Section 848(q) "grants indigent capital defendants a mandatory right to qualified legal counsel and related services in any *federal* post conviction proceeding." *McFarland v. Scott*, 114 S. Ct. 2568, 2571 (1994) (internal quotations and footnote omitted).

App. 9a-10a (emphasis added). After observing that many death row inmates in California have long awaited appointment of *state* counsel, the court concluded that

> By stating its intention to invoke Chapter 154 once a federal habeas petition is filed, the State is forcing the condemned inmates to make an unacceptable choice between two options, leading to the deprivation of federal review of their petitions. The State's announced intention forces a condemned inmate without counsel to decide whether to immediately file a bare bones habeas petition, with no assurance that the district court later will allow an amendment; or to await the appointment of counsel and, consequently, fail to file a petition within the 180-day period.
>
> Making this choice is not a matter of litigation strategy. It is a matter of life and death. If the condemned prisoner chooses to await the appointment of counsel and not file a bare bones petition within the 180-day period, he runs the risk that his initial petition will be deemed a successive petition subject to restrictive federal review. The downside of



> choosing this option is so severe there is little likelihood a prisoner will choose it. The risk is simply too great. If the prisoner chooses the first option and files a bare bones petition within the 180-day time limit of Chapter 154, in all likelihood he will have to do so without the assistance of counsel. In this circumstance, he will have little hope of identifying violations of his federal constitutional rights which may have occurred in state court.

*Id.* at 10a-11a; *see also id.* at 20a ("California cannot take advantage of the six-months limitations period when it takes years to appoint counsel").[4]

The Ninth Circuit did not find that questions concerning the applicability of Chapter 154 would escape resolution *unless* it allowed the prisoners' lawsuit to go forward; to the contrary, it acknowledged that the prisoners could test their understanding of the law against state officials' competing assertions by litigating those disputes in the course of any habeas proceedings in which they arise. Thus, under these circumstances, the court saw "little, if any" difference in "impact on the State's sovereign interests" between, on the one hand, having the state adjudicate the issue by motion in habeas proceedings and, on the other hand, forcing state officials to defend their conduct against the prisoners' coercive suit. App. 12a. Indeed, the latter course serves the interests of "efficiency

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4. Construing the inmates' complaint to plead a free-standing "cause of action" for declaratory judgment, which it believed to be authorized under *Ex Parte Young*, the Ninth Circuit saw no need to "address California's argument relating to the merits of Ashmus's section 1983 claim" App. 14a, 21a; *see* CR 50 (state's motion to dismiss complaint under Fed. R. Civ. P. 12(b)); CR 40 (order denying motion to dismiss); *see also* App. 8a (referring to "other claims still pending before the district court").

and fairness," in the Ninth Circuit's view, because it reduces delay, saves tax dollars, and eliminates any potential that "divergent district court opinions could occur." *Id.* at 13a.

Finally, the Ninth Circuit dismissed state officials' contention that the district court's injunction constituted an impermissible content-based, viewpoint-specific prior restraint on their right and duty to advocate on behalf of the state's interest in protecting its judgments from collateral attack. According to the Ninth Circuit,

> The injunction does not interfere with the state officials' free speech rights. They are free to voice their opinion that the district court, and we, are wrong. The officials, however, may not seek to invoke the opt-in benefits of Chapter 154 in litigation arising under the current state of California law in cases similar to the present case after the district court and this court have determined that the State has not complied with Chapter 154's opt-in requirements.

App. 21a.[5]

Judge Beezer dissented, having been "persuaded by the opinion in *Booth* that the prisoners here have wholly failed to defeat California's immunity defense." App. 23a. Like the inmate suit in *Booth*,

> ". . . this action fails to satisfy the requirements of *Ex Parte Young*. Neither the invocation of a chapter 154 defense, nor the

5. As "clarified" by the Ninth Circuit, the injunction bars California officials "from asserting in any state or federal court that it qualifies" for Chapter 154's reforms "*under the current state of California law.*" "[D]epending upon future events," state officials could seek modification from the district court. App. 3a, 21a, 21a.



> announced intention to assert such a defense, nor the failure to comply with chapter 154 constitutes a continuing violation of federal law. Under these circumstances, we find no authorization in *Ex Parte Young* for abrogating Maryland's Eleventh Amendment immunity. Since injunctive relief is not available in this case under *Ex Parte Young*, declaratory relief is not available either. . . ."

*Id.* at 23a (quoting *Booth*, 112 F.3d at 144 (citing *Green v. Mansour*, 474 U.S. 64, 74 (1985))). As Judge Beezer noted, the majority's refusal to follow *Booth* creates an "inter-circuit conflict of decision in a matter of national concern." *Id.* at 24a.

## REASONS FOR GRANTING THE WRIT

### *Introduction and Summary*

The Ninth Circuit's decision exposing state officials to suit and coercive sanctions for advancing assertedly incorrect legal arguments represents an unprecedented encroachment on the Eleventh Amendment, and conflicts directly with the Fourth Circuit's unanimous decision in *Booth*. Although the resulting conflict will invite revolutionary departures from accepted methods for resolving procedural disputes that arise in the course of *any* litigation to which a state or its officers are, or might become, a party, the need for guidance from this Court is most acute in the precise context presented by this case and *Booth*: construction of Chapter 154, a measure passed by "a Congress intent on expediting capital habeas cases," *Lindh v. Murphy*, 117 S.Ct. at 2065, and "concern[ed] with the perceived acquiescence in capital defendants' dilatory tactics by some federal courts . . .," *id.* at 2069 (Rehnquist, C.J., diss.). *See Booth v. Maryland*, No. 97-5623.

States that have enacted death penalty laws are keenly interested in seeing these long-awaited reforms implemented, with most death row inmates no less resolved to see the reforms blocked. Thus, *both* parties to federal habeas proceedings urgently need to know the proper method and procedure for adjudicating the questions that divide them. The course charted for capital prisoners by the Ninth Circuit, however, not only violates states' immunity under the Eleventh Amendment, but virtually ensures that Congress's intent in enacting Chapter 154 will be thwarted if not wholly defeated—and not just within California and throughout the Ninth Circuit, but around the country.

The Ninth Circuit has determined that "under the current state of California law," the state does not qualify under Chapter 154 because it fails to make "timely" appointments of state counsel; Chapter 154, however, prescribes no time limits within which such appointments must be made as a precondition to its application. Likewise, California's carefully fashioned competency standards have been deemed insufficient because they are not "binding or mandatory," yet no such condition is prescribed in Chapter 154 either. The Ninth Circuit similarly misstates what constitutes a "rule of court" both in Congress's understanding and as a matter of California law, and misconstrues the state law standard governing the California Supreme Court's disbursement of public funds for the investigation of collateral claims.

To be sure, so long as most federal courts outside the Ninth Circuit follow *Booth* and allow other officials to express their views on the implications of Chapter 154 for their states, a body of interpretive decisions will emerge over time revealing the extent to which the Ninth Circuit has misstated Chapter 154's terms. The extent to which the Ninth Circuit misapprehends state law should also appear, albeit not until the state supreme court next has



occasion to address the same subjects. But enlightenment from those sources will forever be lost on the Ninth Circuit and any other court that might embrace its erroneous views, for those courts—by enjoining state officials from presenting or even preserving the issue "in any state or federal court," and thereby denying all but one forum the opportunity to weigh in on the matter—effectively ensure that questions regarding a state's compliance with Chapter 154 will be decided wrongly and, once decided, *never be revisited*. Indeed, absent this Court's intercession in this case, California's only available course will be to *change* its existing mechanism for review of capital cases in an effort to comport with the Ninth Circuit's multiple misapprehensions of law, and then seek a modification of the injunction. In effect, having decided the question of California's compliance "under the current state of California law" in a proceeding that should have been dismissed, the Ninth Circuit has sanctioned a "remedy" that insulates its decision from *ever* being proved wrong. No justification for this extraordinary display of judicial power has been demonstrated. The actions of the district court and Ninth Circuit constitute so grave a departure from the accepted and usual course of judicial process as to compel the exercise of this Court's supervisory power.

## I. The Ninth Circuit's Decision Creates an Intercircuit Split on an Issue of National Importance

The Eleventh Amendment stands as "an essential component of our constitutional structure," *Dellmuth v. Muth*, 491 U.S. 223, 239 (1989), embodying the "integrity retained by each State in our federal system," *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 39 (1994). Among other things, "[i]t . . . serves to avoid 'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.'" *Seminole*

*Indian Tribe of Florida v. Florida*, 116 S. Ct. 1114, 1124 (1996). Under the *Ex Parte Young* doctrine, however, the Eleventh Amendment does not bar suits against state officials when such suits are "*necessary* to permit federal courts to vindicate federal rights and hold state officials responsible to the 'supreme authority of the United States.'" *Papasan v. Allain*, 478 U.S. 265, 277 (1986)(emphasis added); *Green v. Mansour*, 474 U.S. 64, 68 (1985) (to "end a continuing violation of federal law"). The question here, as it was in *Booth*, is whether the Eleventh Amendment's bar should be lifted under *Ex Parte Young* to allow a suit against state officials who disagree with death row inmates over the applicability of Chapter 154, on the theory that the state officials' views are wrong—and thus their expression a "violation of federal law."

Shortly after the instant complaint was filed in the Northern District of California, a nearly identical suit was filed by a group of Maryland prisoners. *Booth v. Maryland*, 940 F. Supp. 849 (D. Md. 1996). The district court in Maryland entered an order extending relief similar to that conferred here. *Id.* at 851-855. The Fourth Circuit reversed, and ordered the proceedings dismissed. *Booth v. Maryland*, 112 F.3d at 141-142. Rejecting the inmates' reliance on *Ex Parte Young*, the Fourth Circuit observed that state officials do not "violate" federal law merely by invoking a federal statute in support of their legal position.[6] Moreover, the ultimate correctness of state officials' position, of course, can be resolved against

6. On this point, the Third Circuit would appear to agree. *Death Row Prisoners v. Ridge*, 948 F.Supp. 1258, 1274 (E.D. Pa. 1996), *terminated by "respective declarations of counsel,"* 106 F.3d 35, 36 (CA3 1997)(construing similar lawsuit "not as importing or implying misconduct or violation of civil rights by any named defendant or official of Pennsylvania").



any competing contentions in the ordinary course of litigating the particular lawsuit in which the disagreement arises, an approach the Fourth Circuit thought "less damaging to state sovereignty" than a separate action pursued under *Ex Parte Young*. *Id.* at 143-144.

In this case, the Ninth Circuit disagreed with *Booth*, and found that a "continuing or impending violation of federal law" inheres in advocacy that is ultimately adjudged to be erroneous.[7] The Ninth Circuit endorsed the decision of the district court in *Booth*, a decision that did not, by that court's own description, "delv[e] into the intricacies of the law concerning Eleventh Amendment immunity." 940 F. Supp. at 851. Although the Ninth

7. Central to the Ninth Circuit's thinking on this point is its apparent belief that the State of California is responsible for appointing counsel to represent death row inmates in their *federal* habeas proceedings, such that the state's delay in making those appointments will somehow cause inmates to be "without counsel" during all or some significant portion of the 180-day filing period prescribed in 28 U.S.C. § 2263, forcing them to file "bare bones" petitions on their own behalf that offer "little hope of identifying violations of . . . federal constitutional rights which may have occurred in state court," "thereby depriving them of their right to the assistance of counsel at this critical stage of the habeas process, in violation of 21 U.S.C. § 848(q)." App. 10a-12a.

Federal appointments, however, are made by the *federal* courts. *E.g.*, No. Dist. Cal. Local R. 296-4. And however great the delay in appointing state counsel might be, the 180-day federal filing period *does not even start to run* until state direct review is completed, 28 U.S.C. § 2263(a), and it remains *tolled* for the entire period during which state collateral proceedings are pending, *id.*-§ 2263(b)(2). Thus if any inmate facing the 180-day deadline is ever "without counsel," or finds it necessary to file a "bare bones" federal petition in order to avoid missing that deadline, or otherwise experiences any deprivation under section 848(q), it will be for some reason *other than* the length of time it took to appoint counsel for *state* unitary proceedings. And, of course, if Chapter 154 is ever actually applied at all, it will be because a federal court so *rules*, not because a state official so urges.

Circuit certainly made no finding that the inmates' suit was "*necessary*" to resolve Chapter 154's applicability, in analyzing the extent to which an *Ex Parte Young* action against state officials would affect California's sovereign interests, the court saw "little, if any" difference between resolving the issue by suit against state officials for allegedly violating federal law and resolving it in the context of those particular habeas cases in which the statute's application had been questioned. Indeed, the Ninth Circuit thought the *Ex Parte Young* action to be preferable for reasons of "efficiency and fairness," App. 13a (citing 940 F. Supp. at 852 n. 3), but apparently did not consider the impact on California's sovereignty that results from having its "official[s] . . . expose[d] . . . to the full remedial powers of a federal court, including, presumably, contempt sanctions." *Seminole Tribe*, 116 S. Ct. at 1133.

Questions concerning the scope and effect of the AEDPA are important, *see, e.g., Felker v. Turpin*, 116 S. Ct. 2333 (1996); *Lindh v. Murphy*, 117 S. Ct. 2059, but no less important now is the issue at the heart of the *Booth-Ashmus* split: What is the proper procedure for resolving those questions? If the Ninth Circuit's reading of *Ex Parte Young* is correct, then both *Felker* and *Lindh* could have been—and perhaps for reasons of "fairness and efficiency" should have been—brought as class action declaratory judgment suits against state officials of Georgia and Wisconsin to challenge the "lawfulness" (i.e., the correctness) of their understanding of the AEDPA. Indeed, if the Ninth Circuit is correct, then literally any disputed issue of federal law that arises in the course of litigation between the state and any private party is subject to resolution, at the private party's option, either (a) by motion in the proceeding to which the dispute relates, or (b) by separate action for a declaratory judgment to establish the "right" of the private party to



prevail on the point, which judgment is then enforceable by ancillary injunctive relief preventing the state from ever asserting its opposing view.

Leaving the *Booth-Ashmus* split unresolved will have profound ramifications not only for states' sovereign interests, but for the quality of the federal judiciary's decisionmaking process. Under the Ninth Circuit's view of *Ex Parte Young*, difficult issues of first impression will be resolved by one (and only one) decisionmaker, whose determination will be reviewed once (and only once) by an appellate court that necessarily will be denied the benefit ordinarily obtained "through development of legal doctrine by allowing litigation in multiple forums." *United States v. Mendoza*, 464 U.S. 154, 163 (1984). The risk of error under these circumstances will be great, as the Ninth Circuit's decision in this case abundantly illustrates. (*See* section II.) But even worse, by enjoining *all* other advocacy on the point from the outset and *in futuro*, courts adhering to the Ninth Circuit's adjudicative model will make their inevitable errors wholly uncorrectable by ordinary legal process. (*See* section III.)

## II. The Ninth Circuit's Decision is Based on Numerous Misapprehensions of State and Federal Law

In deciding that California's unitary review procedure does not qualify under Chapter 154, the Ninth Circuit misconstrued state law and ignored the language of Chapter 154 itself.

For example, the Court concluded that California has no qualifying standards for appointment of counsel because its standards are contained in section 20 of the Standards of Judicial Administration, which is not, as defined in the Introductory Statement of the California Rules of Court, a "rule of court" adopted by the state Judicial Council. App. 18a. But "Rules" adopted by the

Judicial Council are not the only "rules of court" under California law; rather, "[e]very court may make rules for its own government and the government of its officers not inconsistent with the rules adopted and prescribed by the Judicial Council." Cal. Gov't Code § 68070; App. 87a.

Moreover, it is plain from the legislative history of the AEDPA that Congress did not use the term "rule of court" in any narrow or technical sense, but understood it to include such provisions as the California Supreme Court's "Death Penalty Policies," *see* 137 Cong. Rec. at S3221 (Mar. 13, 1991)(noting that "California . . . has adopted a unitary review for capital cases *by rule of its supreme court*" (emphasis added)). Under these circumstances (ignored by the Ninth Circuit), there is simply no reason to suppose that Congress thought California's "Standards of Judicial Administration" would not suffice to establish "standards" of attorney competence within the meaning of Chapter 154. After all, California's "Standards" appear in the "Appendix" to the California Rules of Court, and like the state supreme court's Death Penalty Policies (of which Congress was obviously aware), they are published and bound in volumes that have the words "Court Rules" emblazoned on their spines and covers. At any rate, although the actual specification of California's standards appears in section 20, their *existence* is most certainly "provided" by California Rule of Court 76.5, wherein they are cross-referenced; indeed, "establishing and maintaining lists of qualified counsel" is something that section 20 itself declares is "*required by* rule 76.5." As one often sees with legal "mechanisms," what is "provided" by one device is actually "implemented" by some other: The Northern District of California's own "Assignment Plan," for example, "implement[s] the *provisions*" of both statutes and "Local Rules" by use of a "system," the description of which appears in West Publishing Company's "California Rules of Court—Federal (1997)," in the section



containing, interestingly enough, its "Local Rules." *Id.* at 317, 420.

There is also no requirement in Chapter 154 that the state's standards be "binding or mandatory," as the Ninth Circuit appears to hold. App. 18a-19a. Notably, the *federal* standards for appointing capital counsel are subject to discretionary departure, *see* 21 U.S.C. § 848(q)(7), and there is no basis for assuming that Congress would have wanted state courts to forfeit the comparable measure of latitude and flexibility afforded by Rule 76.5 and section 20, as a condition to qualifying under Chapter 154. Nor, of course, is there any basis for the Ninth Circuit's insinuation that the state supreme court could, or would, "completely disregard" the standards specified in section 20. App. 18a. Indeed, the Ninth Circuit almost certainly knows that insinuation to be unfounded, as Mr. Ashmus's own counsel surely do. *See Bonin v. Vasquez*, 999 F.3d 425, 430 (CA9 1993)(noting well before the AEDPA that California had "extended a right to competent counsel to state habeas petitioners"); Sowards, *And Now for Something Completely Different: Handling a Death Penalty Appeal*, California Litigation (Spring 1989)("Since the restoration of capital punishment in 1977, the California Supreme Court has committed itself to appointing high-caliber attorneys to handle automatic appeals").

The Ninth Circuit also concluded that California "fails to comply with Chapter 154 because . . . [t]the California Supreme Court limits compensation to collateral claims that are discoverable by reference to the four corners of the appellate record." App. 19a (citing *Clark*, 5 Cal.4th at 783-784 & n.19, 21 Cal.Rptr. at 531-532 & n.19, 855 P.2d at 751-752 & n.19). What *Clark* actually says is that counsel in capital cases have

> an express obligation . . . to investigate possible bases for habeas corpus.

. . . .

To facilitate the investigation and preparation of a habeas corpus petition, when appellate counsel is aware of facts which may constitute a basis for habeas relief, he is authorized by the Policies to expend up to $3,000 for investigation of that potential claim without prior approval of the court. . . . Additional sums for investigation may be authorized by the court on an application which identifies the specific issues to be explored and the specific facts which suggest that a basis for a potentially meritorious habeas corpus claim exists. . . . In either case the expenditure will be considered reasonable only to investigate facts which have come to counsel's attention suggesting that a basis for habeas corpus relief may exist. It is not the intent of the court to authorize or fund 'fishing expeditions' whose purpose is solely to discover if any basis for a collateral attack on a presumptively valid judgment can be found.

. . . .

[Counsel's] obligation . . . is limited . . . to an investigation of potentially meritorious grounds for habeas corpus which have come to counsel's attention in the course of preparing the appeal. The appointment does not impose on counsel an obligation to conduct an unfocused investigation having as its object uncovering any possible factual basis for a collateral attack on the judgment. Only an investigation into specific facts known to counsel which could reasonably lead to a potentially meritorious habeas corpus claim is anticipated and required. When the factual basis for a claim is already known, the



claim must be presented promptly unless facts known to counsel suggest the existence of other potentially meritorious claims which cannot be stated without additional investigation.

*Id.* Thus, the California Supreme Court will not fund an investigation if no reasonable basis is shown for believing it will lead to a potentially meritorious claim. That is the *only* limitation, and it is most certainly a *reasonable* one.[8] The state court's reference to the "course of preparing the appeal" simply defines a *time frame*, the very *same* time frame to which Congress referred when defining the period during which a unitary review procedure authorizes the presentation of collateral claims. 28 U.S.C. § 2265; App. 84a (". . . to raise . . . in the course of direct review . . .").[9] The court's reference imposes no limitation on the permissible sources that might support the basis for a valid funding request. Thus, if counsel, *while* representing a death row inmate on appeal, learns—from *any* source—facts "which could reasonably lead to a potentially meritorious habeas corpus claim," investigation is "*required*," and funds will be authorized therefor. California has no "four corners" rule.

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8. "Reasonableness" is the touchstone standard for passing on funding requests in state and federal court alike, *compare* Cal. Pen. Code §1241 *with* 28 U.S.C. § 848(q)(4), and it is also the standard on which Chapter 154 compliance will depend. 28 U.S.C. §§ 2261, 2265; App. 82a-84a. Dispensing investigative funds *without* some basis for believing the expenditure might prove useful would surely be *un*reasonable.

9. The obligation to investigate arises from the court's appointment, the very purpose of which, of course, is to provide representation on appeal *and in any habeas proceeding*; the latter must be initiated "in a timely fashion," and will be presumed timely "if it is filed within 90 days after the due date for the filing of appellant's reply brief *on the direct appeal*." Policies; App. 93a-94a.

Finally, the Ninth Circuit found that "California's failure to actually appoint counsel after an indigent prisoner has said he or she will accept counsel precludes California from qualifying under Chapter 154." In support of this holding, the court cited "evidence that counsel often is not appointed until years after a prisoner accepts the offer of counsel," and added: "California may not take advantage of the six-month limitations when it takes years to appoint counsel." App. 20a.

The Ninth Circuit does not say how *soon* "after" acceptance of the state's offer of counsel it must be honored with an actual appointment. This silence is not surprising, since Chapter 154 imposes no time condition. Indeed, the inmate's "acceptance" is not even the event that triggers appointment: it is the *court's* "finding" of both acceptance and indigency that does that, and no time limit is established for the occurrence of those events either. The Ninth Circuit implies one, however, apparently from Congress's bare use of the word "upon."

Congress knows well how to specify deadlines when its purpose is to ensure that events occur within defined periods, and it did so throughout the AEDPA as it thought appropriate. *See, e.g.*, 8 U.S.C. § 504(e)(3)(C)(not later than 15 days); *id* § 505(c)(3)(B)(not later than 60 days); *id*. § 1252(c)(2)(30 days).[10/] Congress's omission

10. It also knows that the preposition "upon" typically serves to introduce a condition precedent, but without any necessary implication of "immediacy." *See, e.g.*, 21 U.S.C. § 848(q)(9)("*Upon* a finding that . . ."); 18 U.S.C. § 3664(d)(1)("*Upon* the request of the probation officer, but not later than 60 days prior to the date initially set for sentencing . . ."); *id*. § 3664(f)(2)("*Upon* determination of the amount of restitution owed to each victim, the court shall . . ."); *id.* § 3616A(a)(1)("*Upon* a finding that the defendant is in default . . ., the court may . . ."); 28 U.S.C. § 1605(g)(". . . the court, *upon* request of the Attorney General, shall stay . . ."); 18 U.S.C. § 2339B(f)(1)(A)("In any civil proceeding under this section, *upon* request made ex parte and in writing by the United States, a court, *upon* a sufficient showing, may authorize . . .").



of any deadline for a state court's appointment of counsel after making a finding of acceptance and indigency belies the Ninth Circuit's assumption that Congress intended to impose one. And why would Congress have felt any need to impose such a deadline anyway? Delay prejudices the states' interests *wherever* it occurs, and thus the states have ample incentive to reduce their own delay without congressional encouragement.

The Ninth Circuit's insistence that "California may not take advantage of the six-month limitations period when it takes years to appoint counsel" apparently stems from its assumption that delays in *state* appointments somehow leave inmates "without counsel" during the 180-day limitations period. As noted, that assumption is woefully mistaken. *See supra* note 7.

## III. The Ninth Circuit's Decision Unconstitutionally Restrains State Officials From Engaging in Lawful Advocacy

It is one thing for a state to suffer an adverse legal ruling; it is quite another to have its officials "expose[d] . . . to the full remedial powers of a federal court, including, presumably, contempt sanctions," for continuing to present the state's position in pending litigation. The difference is not, as the Ninth Circuit thinks, "a matter of timing, not of substance." App. 12a.

Since May 20, 1996, California officials have been continuously enjoined from arguing that its review procedures comport with the prescriptions of Chapter 154. CR 20. If the district court had simply issued a ruling in a pending habeas proceeding rejecting that position, and the Ninth Circuit had simply affirmed that ruling on

appeal, California's inmates would have obtained as much "certainty" on the point as they are conceivably entitled to get. And whatever justification might have once been conjured for muzzling state officials' advocacy in the district courts during the pendency of the state's appeal to the circuit,[11] that justification surely exists no longer.

Had the Ninth Circuit not been spared the distracting effects of "divergent district court opinions," it might have reached the correct result on the important question before it. The error is now law of the circuit. But it is more than that: By continuing the injunction against state officials' advocacy on the point, the court has made its error wholly uncorrectable by regular legal process.

As we have explained, the Ninth Circuit's conclusion that California does not currently qualify under Chapter 154 rests on numerous misapprehensions of state and federal law. The full extent of those errors, one can confidently predict, will gradually appear as other federal courts begin to produce a body of decisions interpreting Chapter 154 and the California Supreme Court reiterates state law in a way that makes it even clearer that the Ninth Circuit does not understand it. Ordinarily under those circumstances—and *but for* the injunction prohibiting state officials from contending that Chapter 154 should properly be applied "*under the current state of California law*"—we would call those authorities to the attention of the district courts (if only to preserve the issue) and the Ninth Circuit, and urge that the holding of

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11. That there was a risk of "divergent district court opinions," App. 13a, like Ashmus's own confessions of "uncertainty" over the correctness of his position, CR 1 at 3, simply shows that the application of Chapter 154 to California death judgments presents at least an arguable issue over which reasonable minds might differ. To rational decisionmakers, this might seem a reason to foster debate, rather than *enjoin* it.



this case be repudiated. *See Distribuidora Dimsa v. Linea Aerea Del Cobre*, 768 F. Supp. 74 (S.D.N.Y. 1991)("A district court has no authority to reject a doctrine developed by a higher court unless subsequent events make it 'almost certain that the higher court would repudiate the doctrine if given a chance to do so'"); *Robinson v. Jiffy Executive Limousine Co.*, 4 F.3d 237, 242 (CA3 1993)(earlier understanding of state law shown to be incorrect); *Aguirre v. I.N.S.*, 79 F.3d 315, 317 (CA2 1996)("[T]he interests of nationwide uniformity outweigh our adherence to Circuit precedence in this instance"); *Critical Mass Energy Project v. N.R.C.*, 975 F.2d 871, 877 (CCA 1992)("[A] circuit court may reexamine its own established interpretation of a statute if it finds that other circuits have persuasively argued a contrary construction [and] [a]n *en banc* court may also set aside its own precedent if, on reexamination of an earlier decision, it decides that the panel's holding on an important question of law was fundamentally flawed")(en banc); *United States v. Hill*, 48 F.3d 228, 232 (CA7 1995)("When a number of circuits reject a position we have taken, and no other circuit accepts it, the interest in avoiding unnecessary intercircuit conflicts comes into play; and if we are asked to reexamine our position, we can hardly refuse"); *United States v. Gay*, 967 F.2d 322, 327 (CA9 1992)("As a general rule, one three-judge panel of this court cannot reconsider or overrule the decision of a prior panel [unless] 'an intervening Supreme Court decision undermines an existing precedent of the Ninth Circuit, and both cases are closely on point'"); *United States v. Aguon*, 851 F.2d 1158, 1167 n.5 (CA9 1988)("The province and obligation of the *en banc* court is to review the current validity of challenged prior decisions")(en banc).

But in this case, the unprecedented terms of the injunction imposed by the district court, and now sanctioned by the Ninth Circuit, will make such an appeal

to law and reason altogether impossible. "The First and Fourteenth Amendments require a measure of protection for 'advocating lawful means of vindicating legal rights.'" *In re Primus*, 436 U.S. 412, 432 (1978). The judgment of the Ninth Circuit denies state officials "the use of established adjudicatory procedures" to which they are entitled. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1981). This extraordinary deprivation cannot be justified by observing that state officials remain "free to voice their opinion" *outside* the context of litigation, for *access to the courts* is essential to the purpose of such expression. ""Free trade in ideas" means free trade in the opportunity to persuade to action, not merely to describe facts.'" *Primus*, 436 U.S. at 432.

## CONCLUSION

The petition for a writ of certiorari should be granted.

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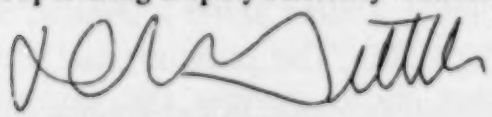

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